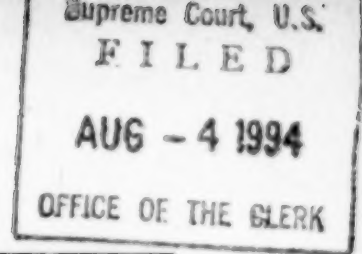


No. 93-1151



In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR PETITIONER FEDERAL ELECTION COMMISSION

LAWRENCE M. NOBLE

General Counsel

RICHARD B. BADER*

Associate General Counsel

VIVIEN CLAIR

Attorney

FOR THE PETITIONER

FEDERAL ELECTION COMMISSION

999 E Street, N.W.

Washington, D.C. 20463

(202) 219-3690

*Counsel of Record

August 4, 1994

48100

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution's separation-of-powers requirement is violated by the inclusion on the Federal Election Commission of two *ex officio* members selected by the Congress, where the statute denies them the right to vote and requires that all decisions on the exercise of the Commission's executive powers be made by majority vote of six Commissioners appointed by the President in conformity with Article II, § 2, cl. 2 of the Constitution.

2. Whether, if question 1 is answered in the affirmative, the actions taken pursuant to statutory authority by the Commission over the course of almost two decades prior to this decision should be accorded *de facto* validity, as this Court did when it found the structure of the original Commission unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976).

STATEMENT NAMING ADDITIONAL PARTIES

Named parties not reflected in the caption are respondent GRANT A. WILLS, as Treasurer of the NRA Political Victory Fund, and respondent NATIONAL RIFLE ASSOCIATION-INSTITUTE FOR LEGISLATIVE ACTION.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
A. The Federal Election Commission	3
1. Background	3
2. The Structure of the Commission	5
B. The NRA's Violation of 2 U.S.C. § 441b: Contributing More Than \$400,000 in Corporate Funds to Its Separate Segregated Fund ..	7
C. The Administrative Proceedings	9
D. The Proceedings in the District Court	9
E. The Proceedings in the Court of Appeals	11
SUMMARY OF THE ARGUMENT	14
ARGUMENT	17
I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NON-VOTING <i>EX OFFICIO</i> MEMBERS ON THE FEDERAL ELECTION COMMISSION	17
II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED <i>DE FACTO</i> VALIDITY	26
III. THE COURT SHOULD NOT REACH THE OTHER ISSUES RAISED BY RESPONDENTS	32
A. The District Court's Decision on the Merits Does Not Warrant Review by this Court	33
B. Respondents' Argument Concerning the President's Removal Authority Is Both Meritless and Premature	34
C. Respondents' Argument Concerning the Commission's Bipartisan Composition Is Both Meritless and Premature	35
CONCLUSION	38

TABLE OF AUTHORITIES

Cases:	Page
<i>AFL-CIO v. FEC</i> , 628 F.2d 97 (D.C. Cir.), <i>cert. denied</i> , 449 U.S. 982 (1980)	33
<i>American Foreign Service Ass'n v. Garfinkel</i> , 490 U.S. 153 (1989)	30
<i>Ameron, Inc. v. United States Army Corps of Engineers</i> , 809 F.2d 979 (3d Cir. 1986), <i>cert. dismissed</i> , 488 U.S. 918 (1988)	22, 26
<i>Andrade v. Lauer</i> , 729 F.2d 1475 (D.C. Cir. 1984)	27, 29
<i>Andrade v. Regnery</i> , 824 F.2d 1253 (D.C. Cir. 1987)	30
<i>Bowles v. Wheeler</i> , 152 F.2d 34 (9th Cir.), <i>cert. denied</i> , 326 U.S. 775 (1945)	30
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	passim
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	passim
<i>Caspari v. Bohlen</i> , 114 S.Ct. 948 (1994)	32
<i>Chemung County v. Dole</i> , 804 F.2d 216 (2d Cir. 1986)	23
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	33
<i>DCP Farms v. Yeutter</i> , 957 F.2d 1183 (5th Cir.), <i>cert. denied</i> , 113 S.Ct. 406 (1992)	23
<i>EEOC v. Sears, Roebuck & Co.</i> , 650 F.2d 14 (2d Cir. 1981)	27
<i>FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981)	33, 36
<i>FEC v. National Republican Senatorial Comm.</i> , No. 93-1612 (D.D.C. Feb. 8, 1994)	13, 31
<i>Franklin Savings Ass'n v. Director, Office of Thrift Supervision</i> , 934 F.2d 1127 (10th Cir. 1991), <i>cert. denied</i> , 112 S.Ct. 1475 (1992)	27
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1962)	27
<i>Harper v. Virginia Dep't of Taxation</i> , 113 S.Ct. 2510 (1993)	31

Cases — Continued:

	Page
<i>Hospital Corp. of America v. FTC</i> , 807 F.2d 1381 (7th Cir. 1986), <i>cert. denied</i> , 481 U.S. 1038 (1987)	35
<i>Humphrey's Executor v. United States</i> , 295 U.S. 602 (1935)	24, 34
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	25
<i>LaRouche v. FEC</i> , No. 92-1555 (D.C. Cir. July 8, 1994)	27
<i>Lear Siegler, Inc. v. Lehman</i> , 842 F.2d 1102 (9th Cir. 1988), <i>rev'd on a different issue</i> , 893 F.2d 205 (9th Cir. 1989) (en banc)	22
<i>McDowell v. United States</i> , 159 U.S. 596 (1895) ...	27
<i>Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.</i> , 501 U.S. 252 (1991)	18, 22, 24, 25
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	passim
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	17, 24, 34, 35
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	36
<i>National Ass'n of Greeting Card Publishers v. United States Postal Service</i> , 569 F.2d 570 (D.C. Cir. 1976), <i>vacated on other grounds sub nom., United States Postal Service v. Associated Third Class Mail Users</i> , 434 U.S. 884 (1977)	27
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425 (1977)	25
<i>Peter Kiewit Sons' Co. v. United States Army Corps of Engineers</i> , 714 F.2d 163 (D.C. Cir. 1983)	23
<i>Pipefitters v. United States</i> , 407 U.S. 385 (1972) ...	33
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549 (1947)	30
<i>SEC v. Bilzerian</i> , 750 F.Supp. 14 (D.D.C. 1990) ..	35
<i>SEC v. Blinder, Robinson, & Co.</i> , 855 F.2d 677 (10th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1033 (1989)	35
<i>Spector Motor Service, Inc. v. McLaughlin</i> , 323 U.S. 101 (1944)	30

Cases—Continued:	Page
<i>Sullivan v. Carrick</i> , 888 F.2d 1 (1st Cir. 1989)	30
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	17
<i>United States v. Nobles</i> , 422 U.S. 225 (1975)	32
<i>United States v. Royer</i> , 268 U.S. 394 (1925)	27
<i>Waite v. Santa Cruz</i> , 184 U.S. 302 (1902)	27
<i>Washington Legal Foundation v. United States Sentencing Comm'n</i> , 17 F.3d 1446 (D.C. Cir. 1994)	22
<i>Wirtz v. Atlantic States Constr. Co.</i> , 357 F.2d 442 (5th Cir. 1966)	30

Statutes and Regulations:

2 U.S.C. § 431(4)	8
432(g)	4
434(a)(2)	4
434(a)(4)	8
437c	3
437c(a)(1)	passim
437c(a)(2)(A)	6
437c(a)(5)	6, 19
437c(b)(1)	2, 6
437c(c)	6, 14, 15, 19
437c(e)	6
437d(a)	6
437d(e)	6
437g	6
437g(a)(2)	6, 9, 14, 19
437g(a)(4)	6, 14, 19
437g(a)(4)(A)(i)	9
437g(a)(6)	14, 19
437g(a)(6)(A)	6, 9
437g(a)(12)	7, 20
437h	30
438(a)(9)	13
441b	7, 10, 33
441b(a)	7, 8, 9

Statutes and Regulations—Continued:	Page
2 U.S.C. § 441b(b)(2)	7
441b(b)(2)(C)	7, 8
441b(b)(4)(A)	7
441b(b)(4)(C)	7
454	12, 29
15 U.S.C. § 41	36
78d(a)	36
26 U.S.C. ch. 95	2, 5
ch. 96	2, 5
28 U.S.C. § 991(a)	36
1254(1)	2
42 U.S.C. § 2000e-4(a)	36
7171(b)	36
49 U.S.C. § 10301(b)	36
11 C.F.R. § 2.2(d)(2)	20
111.21	7, 20
114.5(b)(3)	8, 33
Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455	passim
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)	2, 3
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) ..	2, 4
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) ...	2, 5, 6, 14
Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) ..	2
Social Security Amendments of 1977, Pub. L. No. 95-216, tit. V, § 502, 91 Stat. 1565 (1977)	2
Trademark Clarification Act of 1984, Pub. L. No. 98-620, tit. IV, § 402, 98 Stat. 3357 (1984)	2
Pub. L. No. 100-352, § 6(a), 102 Stat. 663 (1988) ..	2

Statutes and Regulations—Continued:	Page
Pub. L. No. 101-194, tit. VI, § 601(b)(1), 104 Stat. 161 (1990)	2
Pub. L. No. 102-90, tit. I, § 6(d), 105 Stat. 451 (1991)	2
Fed. R. App. P. 43(c)	31
Fed. R. Civ. P. 25(d)	16, 31
Supreme Court R. 35.3	31
 Legislative History:	
<i>Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. (1976)</i>	21, 22
<i>FEC, Legislative History of Federal Election Campaign Act Amendments of 1976 (Aug. 1977)</i>	21, 22
Fed. R. Civ. P. 25(d) advisory comm. note	16, 31
 Miscellaneous:	
Commission Directive No. 10, <i>Rules of Procedure of the Federal Election Commission</i> , 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043 (July 13, 1978)	7, 19
Commission Directive No. 52, <i>Circulation Vote Procedures</i> (rev. June 3, 1992)	20
FEC, Annual Report 1993 (June 1994)	13
58 Fed. Reg. 59,640 (Nov. 10, 1993)	13
58 Fed. Reg. 59,642 (Nov. 10, 1993)	13
The Federalist No. 48 (James Madison) (J. Cooke ed. 1961)	21, 24
<i>Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, 25 Weekly Comp. Pres. Doc. 1851 (Nov. 20, 1989)</i>	36

Miscellaneous—Continued:	Page
<i>Statement on Signing of Cranson-Gonzalez National Affordable Housing Act, 26 Weekly Comp. Pres. Doc. 1930 (Nov. 28, 1990)</i>	36
U.S. Const. art. I	22
U.S. Const. art. II, § 2, cl. 2	4, 14, 19, 35

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1151

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

NRA POLITICAL VICTORY FUND, ET AL., RESPONDENTS.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR PETITIONER

OPINIONS BELOW

The October 22, 1993, opinion, as amended October 25, 1993, of the court of appeals is reported at 6 F.3d 821 (D.C. Cir. 1993), and is reprinted as Appendix A of the Federal Election Commission's petition for writ of certiorari (Pet. App. 1a-18a). The district court's November 15, 1991, opinion and order, as amended December 10, 1991, are reported at 778 F. Supp. 62 (D.D.C. 1991), and appear in Appendix B of the petition (Pet. App. 19a-35a).

JURISDICTION

On October 22, 1993, the United States Court of Appeals for the D.C. Circuit entered judgment in this *de novo* civil law enforcement proceeding, reversing the

district court's judgment in favor of the Commission. In doing so, the court found that 2 U.S.C. § 437c(a)(1) violates the constitutional requirement of separation of powers in providing for the inclusion on the Federal Election Commission ("the Commission" or "FEC") of two *ex officio* members selected by the Congress, who have no right to vote on the exercise of the Commission's powers. The court did not reach the merits of the violations found by the district court because of its conclusion that an agency whose structure violates the Constitution cannot conduct civil law enforcement litigation. On January 18, 1994, the Commission filed a timely petition for writ of certiorari, which was granted on June 20, 1994. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Federal Election Campaign Act of 1971, as amended ("the Act"),¹ codified at 2 U.S.C. §§ 431-455, establishes the Commission as an independent agency with exclusive jurisdiction over the administration and civil enforcement of the Act and the presidential public financing provisions codified in Chapters 95 and 96 of Title 26. 2 U.S.C. § 437c(b)(1). The Act provides that "[t]he Com-

¹ The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Social Security Amendments of 1977, Pub. L. No. 95-216, tit. V, § 502, 91 Stat. 1565 (1977); by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, tit. IV, § 402, 98 Stat. 3357 (1984); by Pub. L. No. 100-352, § 6(a), 102 Stat. 663 (1988); by Pub. L. No. 101-194, tit. VI, § 601(b)(1), 104 Stat. 161 (1990); and by Pub. L. No. 102-90, tit. I, § 6(d), 105 Stat. 451 (1991).

mission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, *ex officio* and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). This case involves the constitutionality of the part of section 437c(a)(1) that includes on the Commission the two non-voting *ex officio* members selected by Congress. Appendix F to the Commission's petition for writ of certiorari sets out in full 2 U.S.C. § 437c and other provisions of the Act describing the Commission's structure, powers, and duties (Pet. App. 42a-67a).

STATEMENT OF THE CASE

A. The Federal Election Commission

1. Background

The Federal Election Campaign Act of 1971 originally designated three "supervising officers" to administer the statute's provisions: the Secretary of the Senate, with respect to candidates for Senator; the Clerk of the House of Representatives, with respect to candidates for Representative or Delegate; and the Comptroller General, for all other cases. Federal Election Campaign Act of 1971 ("1971 FECA"), Pub. L. No. 92-225, § 301(g), 86 Stat. 12 (1972). Their duties included issuing regulations, receiving financial disclosure reports from political committees, making that information available to Congress and the public, conducting audits, investigating complaints of alleged violations of the disclosure rules, and referring possible violations to the Attorney General, who was responsible for bringing civil enforcement actions and criminal prosecutions. 1971 FECA, §§ 304, 306, 308, 86

Stat. 14, 16, 17. After the Commission was created in 1974, the Secretary of the Senate and the Clerk of the House continued to have responsibility, "as custodians for the Commission," for receiving campaign finance reports and statements from candidates' political committees, Federal Election Campaign Act Amendments of 1974 ("1974 FECA"), Pub. L. No. 93-443, § 208(a), (c), 88 Stat. 1263, 1280, 1284, 1286 (1974), a responsibility they continue to have today. 2 U.S.C. §§ 432(g), 434(a)(2).

Congress created the Commission in 1974, in response to the Watergate crisis. In an effort to restore public confidence in the integrity of the federal election campaign financing system, Congress removed the civil enforcement of the campaign financing statutes from the Department of Justice, which was seen as being subject to the partisan influence of the President, and entrusted it instead to an independent, nonpartisan agency. *See* 1974 FECA, § 208, 88 Stat. 1280-1288. The new Commission was composed of the Secretary of the Senate and the Clerk of the House, *ex officio* and without the right to vote, and six voting members. Four of those six members were appointed by members of Congress (two by the President pro tempore of the Senate and two by the Speaker of the House) and the President appointed the remaining two. All six had to be confirmed by a majority of both Houses, and the two members appointed by each of the three appointing authorities could not be affiliated with the same political party. *Id.*, 88 Stat. 1281.

In *Buckley v. Valeo*, 424 U.S. 1, 118-137 (1976), this Court held that the granting of executive powers to such an agency, whose voting members were not appointed by the President pursuant to Article II, § 2, cl. 2, violated the Constitution's separation-of-powers requirement. However, the Court also concluded that "the Commis-

sion's inability to exercise certain powers because of the method by which its members [were] selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. The Court accordingly ruled that "[t]he past acts of the Commission are . . . accorded *de facto* validity." *Id.* The Court also stayed its judgment concerning the Commission's authority for 30 days to afford Congress an opportunity to reconstitute the Commission and ensure uninterrupted enforcement of the Act. *Id.* at 143. The Court "allow[ed] the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Id.* When Congress enacted curative legislation, *see* Federal Election Campaign Act of 1976 ("1976 FECA"), Pub. L. No. 94-283, 90 Stat. 475 (1976), it also adopted provisions recognizing the *de facto* validity of all the actions taken by the Commission before it was restructured to conform to the Constitution.²

2. The Structure of the Commission

In 1976, Congress enacted legislation that restructured the Commission in accord with the constitutional requirements established in *Buckley v. Valeo*, 424 U.S. at 118-137, and reestablished it as the independent agency of the United States Government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act and of Chapters 95 and 96 of Title 26. *See*

² "All orders, determinations, rules, and opinions made, issued, or granted by the Federal Election Commission before its reconstitution under the amendments made by this Act . . . shall continue in effect to the same extent as if such transfer had not occurred." 1976 FECA, § 101(g)(3), 90 Stat. 477. The legislation also provided that pending litigation in which the Commission was a party "shall not abate" as a result of the reconstitution of the Commission. *Id.*, § 101(g)(5).

generally 1976 FECA, §§ 101, 107-109, 90 Stat. 475-77, 481-86, especially the provisions currently codified at 2 U.S.C. §§ 437c(b)(1), 437d(a), (e), and 437g. The Commission has six voting members appointed to staggered six-year terms by the President, with the advice and consent of the Senate. 2 U.S.C. §§ 437c(a)(1), 437c(a)(2)(A). No more than three of these members may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1).

The affirmative votes of at least four of these six members are required for any official Commission action, and a voting Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission," 2 U.S.C. § 437c(c). Affirmative votes of four of these six Commissioners are specifically required for finding that there is "reason to believe" a violation of the Act has occurred, which initiates a Commission investigation, 2 U.S.C. § 437g(a)(2), or finding that there is "probable cause to believe" that a violation has occurred, which leads to mandatory conciliation efforts. 2 U.S.C. §§ 437c(c), 437g(a)(4). If conciliation fails, the Commission, upon the affirmative vote of at least four of these six Commissioners, may decide to file a *de novo* civil enforcement suit, like the present case. 2 U.S.C. § 437g(a)(6)(A).

Section 437c(a)(1) also includes on the Commission two additional officials, the Secretary of the Senate and the Clerk of the House of Representatives, or their designees. The statute specifies, however, that these two officials serve only in an *ex officio* capacity, do not have the right to vote on the exercise of any of the Commission's powers, and may not serve as chairman or vice chairman of the Commission. 2 U.S.C. § 437c(a)(1), (5). The Commission's procedural rules, adopted pursuant to 2 U.S.C. § 437c(e), deny the *ex officio* members such procedural rights as calling a meeting, voting to adjourn or to select a presiding of-

ficer in the absence of the chairman, and being counted in determining the presence of a quorum. Commission Directive No. 10, *Rules of Procedure of the Federal Election Commission*, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978). The Act and Commission regulations also preclude any person, including the *ex officio* members, from disclosing confidential enforcement matters to persons outside the agency. 2 U.S.C. § 437g(a)(12); 11 C.F.R. § 111.21.

B. The NRA's Violation of 2 U.S.C. § 441b: Contributing More Than \$400,000 In Corporate Funds To Its Separate Segregated Fund

The Act prohibits a corporation from making "a contribution or expenditure in connection with any federal election." 2 U.S.C. § 441b.³ The Act also prohibits political committees from knowingly accepting such corporate contributions, 2 U.S.C. § 441b(a). A limited exception to this prohibition permits a corporation to expend its general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by [the] corporation," 2 U.S.C. § 441b(b)(2)(C). However, funds can be contributed to such a separate segregated fund only by the corporation's stockholders and executive or administrative personnel and their families, 2 U.S.C. § 441b(b)(4)(A), and by a membership corporation's members, 2 U.S.C. § 441b(b)(4)(C), not by the corporation itself. If a separate segregated fund chooses to expend its own funds for its administrative or solicitation ex-

³ For purposes of this prohibition, "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value" is a "contribution or expenditure." 2 U.S.C. § 441b(b)(2).

penses, the connected corporation may reimburse the fund for these expenditures "no later than 30 calendar days after the expense was paid by the separate segregated fund." 11 C.F.R. § 114.5(b)(3). Any corporate payments to the separate segregated fund after the expiration of this 30-day period are corporate contributions prohibited by 2 U.S.C. § 441b(a).

The National Rifle Association ("NRA") is a nonprofit membership corporation that operates a separate segregated fund, established pursuant to 2 U.S.C. § 441b(b)(2) (C), called NRA Political Victory Fund ("PVF") (Pet. App. 20a). PVF is registered with the Commission under 2 U.S.C. § 431(4) as a multi-candidate political committee that contributes to federal candidates.

In March and July of 1988 a division of NRA used corporate funds to produce and mail to NRA members letters soliciting contributions to PVF (Pet. App. 20a). On August 1, 1988, PVF transferred to this NRA division \$415,744.72, an amount equal to the combined cost of the solicitations (Pet. App. 20a-21a). Later, respondent Grant A. Wills, who was both PVF's treasurer and the NRA corporate division's fiscal officer, concluded that because PVF's expected revenues had not met projections PVF had insufficient funds for the political contributions and expenditures NRA wanted to make during the upcoming election campaign (Pet. App. 22a, 23a). To compensate for this deficit, the NRA division transferred \$415,744.72 of its corporate funds to PVF on October 20, 1988, just 19 days before the November 8, 1988, election (Pet. App. 21a). PVF quickly converted these corporate funds into political contributions and expenditures (Pet. App. 3a).⁴

⁴ The financial reports PVF filed with the Commission after the election, pursuant to 2 U.S.C. § 434(a)(4), disclosed that in the 18 days after the October 20th transfer of corporate funds to PVF, PVF

C. The Administrative Proceedings

In October 1989, by an affirmative vote of at least four of the six voting Commissioners, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the respondents had violated 2 U.S.C. § 441b(a) as a result of the NRA division's October 20, 1988, transfer to PVF of \$415,744.72 in corporate funds (Pet. App. 36a-37a). After an investigation, the Commission, by an affirmative vote of at least four of the six voting Commissioners, found "probable cause to believe," 2 U.S.C. § 437g(a)(4)(A)(i), that the respondents had violated section 441b(a) (Pet. App. 38a-39a). When its conciliation attempts failed, the Commission, by an affirmative vote of at least four of the six voting Commissioners, authorized the filing of the present civil enforcement action (Pet. App. 40a-41a; J.A. 7-13).⁵ See 2 U.S.C. § 437g(a)(6)(A). At no time during the administrative proceedings did NRA object to the participation of the *ex officio* members, request their exclusion from the case, or question the Commission's constitutional authority to conduct the proceedings or make any of these determinations.

D. The Proceedings in the District Court

On cross-motions for summary judgment, the district court found that the October 20 transfer of money was "intended to bolster the PVF's accounts for its campaign-related activities in support of particular candidates"

made more than \$262,000 in direct and in-kind contributions to 110 federal candidates in 38 states. A copy of this report was included in the record below (pp. 264-80 of the joint appendix in the court of appeals).

⁵ "J.A. ____" references are to the consecutively numbered pages of the Joint Appendix.

rather than to pay for solicitation expenses (Pet. App. 23a). The court also found that the transfer was too late, under the Commission's regulations, to be treated as a lawful reimbursement for the solicitation expenditures that had been made in April and July (Pet. App. 22a). Accordingly, the district court held that the transfer of \$415,744.72 in corporate funds to PVF was a corporate contribution that violated 2 U.S.C. § 441b (Pet. App. 24a). The court assessed a \$40,000 civil penalty and enjoined the defendants from repeating their violations, finding that "the NRA defendants acted deliberately to circumvent prescribed reimbursement and contribution requirements" and that their arguments "would make a mockery of the campaign finance laws" (Pet. App. 33a).

In the district court NRA also raised several affirmative defenses, among which was the claim that Congress violated the Constitution's separation-of-powers requirement by placing the Secretary of the Senate and the Clerk of the House, or their designees, on the Commission in a non-voting, *ex officio* capacity (J.A. 16-17). The district court concluded that this argument provided no defense in this civil law enforcement suit because NRA had neither alleged nor provided evidence that the nonvoting *ex officio* members had affected, or even been present to discuss, any of the Commission's actions involving the NRA (Pet. App. 26a). Accordingly, the court found that NRA had failed to show a sufficient stake in the resolution of this constitutional issue to require the court to resolve it in this lawsuit. The court observed, however, that because the Secretary of the Senate and the Clerk of the House have no vote, they "have no real say in the outcome of any Commission proceeding" (Pet. App. 26a).

E. The Proceedings in the Court of Appeals

A two-judge panel of the D.C. Circuit reversed the district court's judgment.⁶ The court did not reach the merits of the statutory violation found by the district court, but instead addressed only NRA's arguments that the Commission's structure violates the Constitution (Pet. App. 4a). The court rejected two of NRA's constitutional attacks on the Commission as either wrong or nonjusticiable in the circumstances of this case (Pet. App. 8a-12a), but it found that the Commission's structure violated the constitutional separation-of-powers doctrine in that "Congress exceeded its legislative authority when it placed its agents, the Secretary of the Senate and the Clerk of the House of Representatives, on the independent Commission as non-voting *ex officio* members" (Pet. App. 2a). Concluding that the Constitution would not allow an agency so structured to prosecute a civil law enforcement action, the court of appeals reversed the district court's judgment against NRA without reviewing the merits of its decision.

The court of appeals explicitly acknowledged that its holding went beyond any of this Court's precedents because the congressional agents whose roles this Court had previously found to violate separation of powers had all "possessed explicit voting or decisionmaking power that is not present here" (Pet. App. 15a). But the court found the lack of any power to vote on the exercise of the Commission's executive powers to be of no significance. "Even if the *ex officio* members were to remain completely silent during all deliberations . . . , their mere presence as agents of Congress conveys a tacit message to the other Commis-

⁶ Justice Ginsburg sat on the appellate panel that heard oral argument in this case but "did not participate in [the court's] opinion" (Pet. App. 1a n.*).

sioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other Commissioners” (Pet. App. 13a-14a).

The Constitution . . . “anticipates that the coordinate Branches will converse with each other on matters of vital common interest.” *Mistretta v. United States*, 488 U.S. 361, 408 (1989). The Commission argues that Congress intended *ex officio* membership to fulfill this coordinating function by having the Secretary and the Clerk play a mere “informational or advisory role” in agency decisionmaking. Advice, however, surely implies influence, and Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role.

(Pet. App. 15a.) On this basis, the court concluded that “the mere presence of agents of Congress on an entity with executive powers offends the Constitution” (Pet. App. 15a).

The court found that, under the Act’s severability clause, 2 U.S.C. § 454, “the unconstitutional *ex officio* membership provision can be severed from the rest of [the Act],” so that “Congress is not even required after our decision, as it was after *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)], to amend the statute” (Pet. App. 17a, 16a). But the court rejected the Commission’s argument that, regardless of whether the *ex officio* provision is constitutional, the civil law enforcement action against NRA should be preserved under the *de facto* officer doctrine (Pet. App. 17a-18a). The court acknowledged that this Court had applied the *de facto* officer doctrine in *Buckley*, 424 U.S. at 142-43, to recognize the validity of the Commission’s past actions after finding that the Commission’s structure, which then included four *voting* Commissioners appointed by Congress, violated the Constitution’s separation-of-powers requirement (Pet. App. 17a). But the

court of appeals declined to follow this precedent because the constitutionality of the Commission’s structure was raised here as an affirmative defense to a law enforcement suit, and the court could not “declare the Commission’s structure unconstitutional without providing relief to the appellants in this case” (Pet. App. 17a, 18a).

Four days later, on October 26, 1993, the Commission voted to reconstitute itself as a six-member agency without *ex officio* members in accord with the court of appeals decision, subject to further action by this Court. *See* FEC, Annual Report 1993, at 3-4, 27 (June 1, 1994).⁷ The reconstituted Commission has devoted substantial resources to ratifying and/or reconsidering its prior actions in ongoing proceedings in an effort to continue to administer and enforce the Act as effectively as possible while conforming with the decision below. *See id.*; 58 Fed. Reg. 59,640, 59,642 (Nov. 10, 1993). The adequacy of the Commission’s efforts to comply with this decision has been challenged so far in four cases in district courts and three cases at the appellate level. To date, one district court has addressed the issue, denying a motion to dismiss a civil enforcement case filed before the decision below because the Commission had, after it was reconstituted, voted to ratify its prior decisions and to continue prosecuting the lawsuit. *FEC v. National Republican Senatorial Comm.*, No. 93-1612 (D.D.C. Feb. 8, 1994) (Hogan, J.).

⁷ The Commission has lodged with the Clerk of Court copies of the Commission’s annual report, which is issued pursuant to 2 U.S.C. § 438(a)(9).

SUMMARY OF ARGUMENT

1. The 1976 amendments to the Federal Election Campaign Act of 1971 ("the Act") established the Federal Election Commission as an independent, nonpartisan agency "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, *ex officio* and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). The primary issue before the Court is whether the mere presence at the Commission of these two congressional officials, in a nonvoting advisory and informational role, violates the Constitution's requirement of separation of powers among the three branches of government.

The Constitution does not permit Congress or its agents "to exercise the responsibilities of the other Branches," but this Court has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). There is no dispute in this case that the Secretary and the Clerk are agents of Congress who "may not be entrusted with executive powers." *Bowsher v. Synar*, 478 U.S. 714, 732 (1986). The Act does not violate the Constitution, however, because it does not give them any direct or indirect control over the exercise of the Commission's executive powers.

The Act specifies that the Commission can only exercise its statutory powers pursuant to the votes of a majority of the six Commissioners that are nominated by the President and confirmed by the Senate pursuant to Article II, § 2, cl. 2 of the Constitution. 2 U.S.C. §§ 437c(c); 437g(a)(2), (4), (6). Thus, by explicitly providing that the *ex officio* members are "without the right to vote," 2 U.S.C. § 437c(a)(1), and forbidding any voting Commissioner

from delegating voting authority to any other person, 2 U.S.C. § 437c(c), Congress carefully reserved all of the Commission's executive authority to the six Commissioners appointed by the President. The only power given to the *ex officio* members by the Act is to give advice and express their views to the voting Commissioners during Commission meetings, and the voting Commissioners are entirely free to disregard that advice with impunity and exercise the Commission's powers as they see fit.

In sum, the Constitution only requires the separation of powers, and does not restrict the members of one branch of government from merely advising or seeking to persuade independent decisionmakers in another branch. Therefore, Congress did not violate the Constitution by giving the Secretary and the Clerk this carefully restricted advisory role at this nonpartisan independent agency, in which they have no right to control, or even to participate in, the votes that are the only mechanism through which the Commission can exercise its executive powers.

2. If this Court finds unconstitutional the portion of 2 U.S.C. § 437c(a)(1) providing for nonvoting *ex officio* members of the Commission, the Court should follow its precedent in *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976), and preserve the public interest in the uninterrupted administration and enforcement of the Act by according *de facto* validity to the Commission's actions prior to this decision. In *Buckley*, when the Court invalidated the structure of the original Commission on separation-of-powers grounds because a majority of the voting Commissioners had been appointed by members of Congress, it accorded *de facto* validity to the Commission's past actions in administering and enforcing the campaign finance statutes. In addition, it stayed its decision to permit the Commission to continue administering the Act for a short period while Congress had an opportunity to restructure

the Commission to conform to the Constitution. As the court of appeals found, however, the *ex officio* provision at issue here is severable from the remainder of the Act, so that after departure of the *ex officio* members the six Commissioners appointed by the President can continue to administer the Act without any action by Congress.

By recognizing the *de facto* validity of the Commission's past actions, the Court can fully remedy Respondents' constitutional claim and still protect the public interest in uninterrupted enforcement of the Act. Their claimed constitutional right to have the law enforced against them only at the behest of an agency meeting constitutional requirements would be preserved if the Commission, after being reconstituted without *ex officio* members, has an opportunity to decide whether to continue prosecuting this civil law enforcement action before the court of appeals proceeds to consideration of the merits of the case. See Fed. R. Civ. P. 25(d), and 1961 Advisory Committee Notes. If the reconstituted Commission decided to proceed, there would be no remaining constitutional impediment to entry of judgment against them if the court of appeals were to uphold the district court's findings that they violated the Act.

3. Although Respondents filed no cross-petition, they raised three issues in their brief in opposition that were not presented in the petition for certiorari. The court of appeals rejected their arguments on two of these issues, presenting additional constitutional challenges to the Commission, and the district court rejected their arguments on the third issue, whether they violated the Act.

The Court should decline to reach any of these issues. None is a necessary predicate to the resolution of the questions presented in the petition for certiorari and Respondents have not shown that any of them warrants plenary review by this Court. In fact, the two constitutional issues

they raise would be premature on the facts of this case, and their arguments for reversing the district court's application of the Act and the Commission's regulations to the undisputed facts of this case have not yet been reviewed by the court of appeals. Accordingly, there is no reason for the Court to address any of these extraneous issues presented by Respondents.

ARGUMENT

I. SEPARATION OF POWERS IS NOT VIOLATED BY THE INCLUSION OF NONVOTING *EX OFFICIO* MEMBERS ON THE FEDERAL ELECTION COMMISSION

Although this Court has repeatedly "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches," the Court has "never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)). Rather than requiring "a hermetic division among the Branches" of the federal government, the separation-of-powers principle is a "'safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Mistretta v. United States*, 488 U.S. 361, 381, 382 (1989) (quoting *Buckley v. Valeo*, 424 U.S. at 122).

Accordingly, this Court has consistently applied the separation-of-powers principle, as its name suggests, solely as a restriction on the distribution of governmental *power* within our constitutional system, and not as a restriction on opportunities for "the coordinate Branches [to] converse with each other on matters of vital common interest." *Mistretta*, 488 U.S. at 408. The Court has "invalidated attempts by Congress to exercise the responsibilities of other

Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch." *Id.* at 382 (emphases added). However, it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Id.*

In this case, the court of appeals concluded (Pet. App. 16a) that Congress violated the Constitution in "plac[ing] its agents 'beyond the legislative sphere' by naming them to membership on an entity with executive powers." This Court has explained, however, that "the Constitution imposes two basic and related constraints on the Congress" to "forestall the danger of encroachment 'beyond the legislative sphere'":

It may not "invest itself or its Members with either executive power or judicial power." . . . And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (citations omitted). It has not been alleged in this case that Congress has violated the second constraint. With respect to the first constraint, it is undisputed that the *ex officio* members of the Commission are agents of the Congress who, under the Court's analysis in *Bowsher v. Synar*, 478 U.S. 714, 728-31 (1986), "may not be entrusted with executive powers." *Id.* at 732. Thus, as in *Bowsher*, 478 U.S. at 732, the only "remaining question is whether [they] ha[ve] been assigned such powers."

The Act vests the *ex officio* members of the Commission with no authority to determine how the Commission exercises any part of its executive powers. After this Court's decision in *Buckley v. Valeo*, 424 U.S. at 109-141, that the

appointment of voting Commissioners by Congress was unconstitutional, Congress amended the Act to require that all six members of the Commission possessing a vote on the exercise of its powers must be nominated by the President and confirmed by the Senate in accord with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. See 2 U.S.C. § 437c(a)(1). Congress went to great lengths to specify that the power to administer and enforce the Act is vested exclusively in these six Commissioners appointed by the President. The statute explicitly provides that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission," 2 U.S.C. § 437c(c),⁸ and that the *ex officio* members are "without the right to vote" on such decisions, 2 U.S.C. § 437c(a)(1). The statute also specifies that a Commissioner "may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act," 2 U.S.C. § 437c(c). By so carefully reserving all authority to the six Commissioners appointed by the President, the Act effectively precludes the *ex officio* members not only from controlling, but even from participating in, the votes that are the only mechanism by which the Commission can exercise its executive powers.⁹

⁸ The statute reemphasizes this restriction on the exercise of the Commission's civil law enforcement powers. See 2 U.S.C. § 437g(a)(2), (4), (6).

⁹ The Act also prohibits the *ex officio* members from having even such indirect procedural control as might be obtained by serving as chairman or vice chairman, 2 U.S.C. § 437c(a)(5), and the Commission's procedural rules explicitly deny them the rights enjoyed by voting Commissioners to call a meeting, to vote either to adjourn or to select a presiding officer in the absence of the chairman, or even to be counted in determining a quorum. See Commission Directive No. 10,

In fact, the statute empowers these individuals in their limited *ex officio* role to do nothing more than to give advice and express their views to the voting Commissioners during Commission meetings. The voting Commissioners are free to disregard the advice of the *ex officio* members with impunity and to cast their votes to exercise the Commission's powers as they see fit. Moreover, many Commission decisions are made by circulation or notation vote without any discussion at a meeting. See Commission Directive No. 52, *Circulation Vote Procedures* (rev. June 3, 1992); 11 C.F.R. § 2.2(d)(2).¹⁰ In addition, 2 U.S.C. § 437g(a)(12) effectively precludes the *ex officio* members, like everyone else, from disclosing to persons outside the agency—including members of Congress—any confidential information about agency enforcement matters. See also 11 C.F.R. § 111.21. The statute and implementing regulations thus give the *ex officio* members no power to interfere in any way in the exercise of the Commission's powers by the six Commissioners appointed by the President.¹¹

Rules of Procedure of the Federal Election Commission, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-2514 (July 13, 1978).

¹⁰ Copies of Directive No. 52 have been lodged with the Clerk of Court.

¹¹ The conclusion of the court of appeals that "[a]t least certain members of Congress" expected the *ex officio* members to "serve its interests" (Pet. App. 13a) is both irrelevant and misleading. It is irrelevant because a statute that does not confer upon agents of Congress any direct or indirect control over the exercise of executive power is not made unconstitutional by the often unrealistic hopes or expectations of individual legislators. It is misleading because the dialogue between two Senators cited by the court of appeals actually reflects only uncertainty about the role the *ex officio* members would be able to play at the Commission under the statutory provisions being adopted. In contrast, Senator Kennedy had initially proposed retaining the *ex officio* members at the Commission in 1976 because their

The court of appeals did not disagree with the conclusion that the *ex officio* members of the Commission have no statutory authority to exercise executive powers. Instead, the court's view was that the lack of executive power is not enough to satisfy the Constitution, and that the Act violates the Constitution because the *ex officio* members are in a position where they have "the potential to influence" the decisions of the six voting Commissioners appointed by the President (Pet. App. 13a-14a). However, James Madison explained that the key to separation of powers for "all sides" among the Founders was that no branch of the federal government be permitted to have "an overruling influence over the others." The Federalist No. 48, at 332 (J. Cooke ed. 1961) (emphasis added). Thus, Congress "has the power to seek to influence executive action through the force of its opinions" or to permit its agents "to influence the executive's execution of the laws through the powers of public illumination and persua-

"expertise, knowledge, and understanding" would be "useful for the Commission," *Federal Election Campaign Act Amendments, 1976: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration* ("1976 Hearing"), 94th Cong., 2d Sess. 74-75 (1976), reprinted in *FEC, Legislative History of Federal Election Campaign Act Amendments of 1976* ("1976 Leg. Hist."), at 80-81 (August 1977). One of the original voting Commissioners testified that the *ex officio* members had, in fact, "served in consultative functions, a liaison function," and that the voting Commissioners had "found their service helpful rather than otherwise." *1976 Hearing* at 155, reprinted in *1976 Leg. Hist.* at 161 (testimony of FEC Vice Chairman Thomas Harris). The institutional roles of the Secretary of the Senate and the Clerk of the House give them a special understanding of the daily functioning of the Senate and the House that can be particularly relevant to some of the political issues within the Commission's jurisdiction. These officials also had accumulated considerable experience in administering the campaign finance laws before the Commission was created. See pp. 3-4, *supra*.

sion." *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 992, 993 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). "[T]he critical issue is whether Congress or its agent seeks to *control* (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process. . . . If Congress 'in effect has retained control,' its action and the statutory provision on which it is based is unconstitutional." *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988) (emphasis in original) (quoting *Bowsher v. Synar*, 478 U.S. at 734), *rev'd on a different issue*, 893 F.2d 205 (9th Cir. 1989) (en banc). The court below itself recognized in a later case that "influence is not control," *Washington Legal Foundation v. United States Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994).¹²

Consistent with that view, this Court has never applied the separation-of-powers principle as a restriction on statutory opportunities for members of one branch to seek to influence another branch's exercise of its own constitutional powers by the mere persuasiveness of their advice

¹² During the 1976 hearings, the Ford Administration suggested that the presence of the *ex officio* members at Commission meetings can be analogized to the participation in deliberations of a decisionmaker recused for conflict of interest. See *1976 Hearing* at 119 (statement of then Assistant Attorney General Scalia), *reprinted in 1976 Leg. Hist.* at 125. However, conflict-of-interest principles are concerned with maintaining the appearance and actuality of impartiality in decisionmaking. Separation of powers, in contrast, concerns structuring the government "to protect the liberty and security of the governed" by "dispers[ing] the federal power among the three branches." *Metropolitan Washington Airports Authority*, 501 U.S. at 272. The remedy for a perceived conflict of interest is not a restructuring of the agency, but recusal of the person with a conflict from a particular case. NRA never requested the *ex officio* members to recuse themselves from this case for a conflict of interest, or for any other reason.

or views.¹³ The court of appeals acknowledged that this Court has only found violations of separation of powers in cases in which Congress or its agents "possessed explicit voting or decisionmaking power that is not present here" (Pet. App. 15a), and it also agreed that the Constitution permits members of Congress to "advise, coordinate, and even directly influence an executive agency" through "oversight hearings, appropriation and authorization legislation, or direct communication with" the agency (Pet. App. 16a). Indeed, it is an accepted "political reality that 'members of Congress are requested to, and do in fact, intrude in varying degrees, in administrative proceedings.'" *DCP Farms v. Yeutter*, 957 F.2d 1183, 1188 (5th Cir.) (internal citation omitted), *cert. denied*, 113 S.Ct. 406 (1992).¹⁴

¹³ Indeed, the Court has twice applied separation-of-powers analysis to federal commissions, including the Federal Election Commission, that include *ex officio* members from another branch, without treating the inclusion of the *ex officio* members as a factor relevant to the constitutional question. *Buckley v. Valeo*, 424 U.S. at 113 (The Commission "consists of eight members" including two "*ex officio* members . . . without the right to vote") and at 137 ("the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners"); *Mistretta*, 488 U.S. at 368 ("The Attorney General, or his designee, is an *ex officio* non-voting member" of the Sentencing Commission).

¹⁴ The courts of appeals have found due process violations from congressional attempts to influence executive administrators only where there is substantial proof both of improper pressure on a decisionmaker and of prejudice to a party's rights in a particular case. See, e.g., *DCP Farms v. Yeutter*, 957 F.2d at 1187-88, and cases discussed therein; *Chemung County v. Dole*, 804 F.2d 216, 221-222 (2d Cir. 1986). The burden is especially heavy when, as here, the agency action is not adjudicatory. See, e.g., *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983). As the district court emphasized (Pet. App. 26a), NRA did not even try to make such a showing in this case. Indeed, there was nothing in the record before the court of appeals in this case indicating whether the *ex officio* members participated in, or were even present during, agency deliberations.

The court's only remaining basis for finding a constitutional violation here, then, is that the *ex officio* agents of Congress are designated by statute as members of the Commission (Pet. App. 14a-16a). However, this Court has repeatedly admonished that separation-of-powers analysis does not turn on labels,¹⁵ and the separation-of-powers principle does not authorize courts to invalidate statutes out of a general wariness of Congress's ability to "mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments" (Pet. App. 15a, quoting *The Federalist* No. 48, at 334 (J. Madison) (J. Cooke ed. 1961)). Instead, the "inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences,'" *Mistretta*, 488 U.S. at 393 (citation omitted), to ensure that "each of the three general departments of government [remains] entirely free from the control or coercive influence, direct or indirect, of either of the others," *id.* at 380 (emphasis added, quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). To that end, in every case where a statute has been alleged to violate the separation-of-powers principle, this Court has always found it necessary to analyze carefully the nature of the powers conferred upon Congress or its agents by the particular statute at issue. See, e.g., *Metropolitan Washington Airports Authority*, 501 U.S. at 276 ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it"); *Morrison v. Olson*, 487 U.S. at 694 ("Congress retained for itself no powers of control or supervision over an independent counsel"); *Bowsher v. Synar*, 478 U.S. at 732 ("[B]ecause Congress has retained removal authority over the Comptroller General, he may

¹⁵ *Washington Metropolitan Airports Authority*, 501 U.S. at 267 (quoting *Mistretta*, 488 U.S. at 393); *Morrison*, 487 U.S. at 689.

not be entrusted with executive powers. The remaining question is whether the Comptroller General has been assigned such powers"); *Buckley v. Valeo*, 424 U.S. at 137 ("[T]he ultimate question is which, if any, of [the Federal Election Commission's] powers may be exercised by the present voting Commissioners").

Because it disregarded the analytic method established by these precedents, the court of appeals failed to ask the right questions, the answers to which show that 2 U.S.C. § 437c(a)(1) is constitutional. The court of appeals did not inquire whether the Act permits Congress, by its agents sitting *ex officio* and in a nonvoting capacity on the Commission, to exercise control or coercive power over the actions of this nonpartisan, independent agency. Nor did the court examine whether the mere presence of these *ex officio* members prevents the Executive Branch from accomplishing its assigned functions. Instead, the court simply conflated the constitutionally permissible opportunity to influence executive officials through sound advice with the unconstitutional power to exercise direct or indirect control over executive decisionmaking.

In sum, unlike the statute found unconstitutional in *Bowsher v. Synar*, 478 U.S. at 727, section 437c(a)(1) does not pose a "danger[] of congressional usurpation of Executive Branch functions." It does not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions," *Mistretta*, 488 U.S. at 383 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). Nor does section 437c(a)(1) circumvent Article I procedures by according Congress or its agents the power to veto agency decisions, as in *INS v. Chadha*, 462 U.S. 919, 956-58 (1983), and *Metropolitan Washington Airports Authority*, 501 U.S. at 276. Instead, the Act "encourages the [Legislative and Executive] branches to work together without enabling either branch to bind or compel

the other. That is the way a government of divided and separated powers is supposed to work." *Ameron*, 809 F.2d at 998.

II. THE COMMISSION'S PAST ACTIONS SHOULD BE ACCORDED *DE FACTO* VALIDITY

Even if this Court concludes that the presence of *ex officio* members at the Commission is unconstitutional, the Court should reverse the judgment below. In *Buckley v. Valeo*, 424 U.S. at 142, this Court ruled that all Commission actions prior to the Court's decision should be accorded *de facto* validity even though the Court had invalidated the Commission's structure on separation-of-powers grounds. Respondents have not disputed the finding of the court of appeals (Pet. App. 17a, 16a) that "the unconstitutional *ex officio* membership provision can be severed from the rest of" the Act, so that "Congress is not even required after our decision . . . to amend the statute" in order to provide for the continuing administration of the Act by a reformed Commission. The Commission can thus continue, without congressional action, to administer and enforce the Act as before, but without the *ex officio* members. In these circumstances, the Respondents' claimed constitutional right to have the law enforced against them only at the behest of an agency satisfying separation-of-powers requirements would be fully protected if a reformed Commission makes a determination to pursue this case before the court of appeals proceeds to consider the merits of the statutory violation alleged. Such carefully tailored relief would provide Respondents with complete relief on their constitutional claim without undermining the public interest in the uninterrupted enforcement of the Act.

It is "well settled" that "where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)).¹⁶ This *de facto* officer doctrine "was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981).¹⁷

As the court of appeals acknowledged (Pet. App. 17a), when this Court invalidated the Commission's original structure on separation-of-powers grounds in *Buckley v. Valeo*, 424 U.S. at 140-41, the Court in effect applied the *de facto* officer doctrine when it found the Commission's past actions to be *de facto* valid. At the time of *Buckley*,

¹⁶ The Court in *Glidden* ultimately declined to apply the *de facto* officer doctrine because the cases before it involved challenges to the designation by the courts below of non-Article III judges and thus affected the validity of the judgments under review. 370 U.S. at 536. There is no constitutional challenge here to either the structure or the jurisdiction of the district court that entered judgment against the Respondents. See *LaRouche v. FEC*, No. 92-1555, slip op. at 5 (D.C. Cir. July 8, 1994) ("NRA...dealt not with our authority to consider the FEC's enforcement action but with its authority to bring it").

¹⁷ See also, e.g., *United States v. Royer*, 268 U.S. 394, 397 (1925); *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902); *Franklin Savings Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1150 (10th Cir. 1991), cert. denied, 112 S.Ct. 1475 (1992); *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 579 (D.C. Cir. 1976), vacated on other grounds sub nom., *United States Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977); *Andrade v. Lauer*, 729 F.2d 1475, 1496-99 (D.C. Cir. 1984).

the Act provided for congressional officers to appoint four of the Commission's six *voting* members. See p. 4 *supra*. Despite the unconstitutional composition of this original Commission, the Court concluded that "the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date," 424 U.S. at 142. In fact, the Court went even further, finding that uninterrupted enforcement of the federal election campaign finance statutes was important enough to warrant permitting the Commission to continue to act *de facto* for a short period during which Congress could reconstitute the agency. "This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." *Buckley*, 424 U.S. at 143. When Congress reconstituted the Commission after the *Buckley* decision, it effectively incorporated this Court's ruling into the legislation, see *supra* p. 5 & n.2, thus clearly evidencing its intent that the uninterrupted enforcement of the Act be maintained even when the Commission itself must be modified to satisfy the Constitution.

The *Buckley* precedent requires recognition of the *de facto* validity of the Commission's prior actions in this case as well. Indeed, because it is undisputed here that the *ex officio* membership provision is severable from the remainder of the Act (Pet. App. 16a-17a), the Commission can proceed to administer the Act without the *ex officio* members in response to the Court's ruling without any need for the sort of stay utilized in *Buckley* to permit Con-

gress to reconstitute the agency.¹⁸ The constitutional defect found by the court of appeals in this case can be remedied without congressional action because it is much more peripheral to the Commission's exercise of executive power than was true in *Buckley*, for here all of the Commission's decisions since 1976 have been made by majority vote of the six Commissioners appointed by the President, while before *Buckley* a majority of the Commissioners that had voted on the Commission's actions had been appointed by members of Congress. Thus, affording *de facto* validity to the Commission's prior actions here not only comports with congressional intent embodied both in the Act's severability clause, 2 U.S.C. § 454, and in the transitional provisions enacted when Congress reestablished the Commission after the *Buckley* decision, see p. 5 n.2, *supra*, but it compromises constitutional concerns in the circumstances of this case far less than it did in *Buckley*.

The court of appeals refused to apply the *de facto* officer doctrine here and instead simply reversed the district court's judgment against the Respondents without reviewing the merits. The *de facto* officer doctrine should be disregarded here, the court stated, because it would "foreclose any challenge to the authority of public officers" and "make it impossible for these [Respondents] to bring their assumedly substantial constitutional claim," Pet. App. 17a n.6 (quoting *Andrade v. Lauer*, 729 F.2d at 1498). The court was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case" (Pet. App. 18a).

¹⁸ The Commission actually took this action, subject to further review by this Court, immediately after the direction of the court of appeals. See p. 13, *supra*.

While the court's reasoning could be questioned on several other grounds,¹⁹ the court's conclusion that it was required to grant NRA some relief in order to reach the constitutional issue does not justify its refusal to follow this Court's precedent in *Buckley* and accord the Commission's past actions *de facto* validity. As we have already shown, Respondents can be afforded full relief on their constitutional claim by delaying consideration of the merits of the case until the reconstituted Commission has an opportunity to decide whether to proceed with this civil law enforcement suit against them. See p. 26, *supra*.²⁰

¹⁹ The court's view that the *de facto* officer doctrine should simply be cast aside whenever necessary to reach a constitutional issue is contrary to the "deeply rooted" doctrine that courts "ought not to pass on questions of constitutionality...unless such adjudication is unavoidable." *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). "Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings." *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989). The court of appeals was also wrong in its supposition that refusal to treat a constitutional challenge to the Commission's composition as a valid defense to a civil law enforcement suit "would foreclose any challenge to the authority of public officers" (Pet. App. 17a n.6). Congress included in the Act a special provision for the litigation of such constitutional challenges in declaratory judgment actions, 2 U.S.C. § 437h, and this was the procedure under which this Court invalidated the composition of the original Commission in the *Buckley* decision.

²⁰ "A governmental body 'may effectively ratify what it could theretofore have lawfully authorized.'" *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989) (citation omitted). See also *Bowles v. Wheeler*, 152 F.2d 34, 40 (9th Cir.), *cert. denied*, 326 U.S. 775 (1945) ("[I]t appears settled law that 'the unauthorized bringing of an action may * * * be ratified by the person in whose name and on whose account it was brought so as to sustain the action from the beginning'" (citation omitted)); *Wirtz v. Atlantic States Constr. Co.*, 357 F.2d 442, 446 (5th Cir. 1966); *Andrade v. Regnery*, 824 F.2d 1253, 1256 (D.C. Cir. 1987).

If the reconstituted Commission were then to vote to proceed with the prosecution of the case, the Respondents would have no remaining constitutional right to avoid entry of judgment against them. See Fed. R. Civ. P. 25(d) (substitution of public officers) and Advisory Committee notes on the 1961 amendment ("Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action"). See also Fed. R. App. P. 43(c); Supreme Court R. 35.3.

Such a procedure would provide Respondents with all the relief necessary to protect their claimed constitutional rights, but would not give them the windfall of entirely escaping liability for violating the Act. It would also permit the reconstituted Commission to pick up where the former Commission left off and continue to administer and enforce the Act in an orderly manner, with respect to NRA and other alleged violators, just as this Court found appropriate in *Buckley*, 424 U.S. at 142-43.²¹ Accordingly, if this Court holds unconstitutional the portion of

²¹ Contrary to the apparent assumption of the court of appeals (Pet. App. 18a), *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), does not foreclose such a carefully tailored remedy. *Harper* would require that a finding by this Court that inclusion of the *ex officio* members on the Commission violates the Constitution be applied in all other pending cases in which the issue is not procedurally barred. It would not preclude the Court from also applying the *de facto* officer doctrine to fashion an appropriate remedy in this case, and then granting the same remedy to others in similar circumstances. The one lower court that has thus far addressed the matter concluded that the reconstituted Commission could proceed with a civil enforcement action once it had "ratified its earlier finding that there was probable cause to believe a violation occurred and its subsequent decision to institute this action." *FEC v. National Republican Senatorial Comm.*, No. 93-1612 (D.D.C. Feb. 8, 1994).

section 437c(a)(1) providing for nonvoting *ex officio* members, the Court should, as in *Buckley v. Valeo*, 424 U.S. at 142, accord *de facto* validity to the Commission's past actions in administering and enforcing the campaign finance statutes and remand the case to the court of appeals with instructions to proceed to review the merits of the district court's judgment if the reconstituted Commission votes to continue pursuing this case.

III. THE COURT SHOULD NOT REACH THE OTHER ISSUES RAISED BY RESPONDENTS

Respondents filed no cross-petition for writ of certiorari. Nonetheless, in their brief in opposition, Respondents asked this Court to resolve three issues not presented by the Commission's petition. The court of appeals (Pet. App. 8a-12a) explicitly rejected Respondents' arguments on two of these issues (Opp. at i, questions 2 and 3). Their arguments concerning the third issue (*id.*, question 4), relating to the merits of the case, were rejected by the district court (Pet. App. 22a-24a, 33a), whose findings have not yet been reviewed by the court of appeals.

Respondents assert (Opp. 14) that these three issues represent alternative grounds for affirming the judgment below. However, none of these issues is a "necessary predicate to the resolution of the question[s] presented in the petition" for certiorari, *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994), and this Court need not entertain any of them unless they are "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975). Respondents have not claimed that the decisions of the lower courts on any of these issues are in conflict with the precedents of this Court or of any other lower court, nor have they shown any other reason why the resolution of these issues against them is "of

sufficient general importance" to warrant a grant of certiorari. Accordingly, the Court should decline to reach these issues.

A. The District Court's Decision on the Merits Does Not Warrant Review by This Court

Respondents summarily assert (Opp. 18-19) that the district court erred in finding that they violated the Act. The district court's decision rested, however, on a straightforward application of the statutory terms and the Commission's regulations to the particular facts of this case. The court's findings were in accord with the Commission's expert construction of the statute, a construction entitled to substantial deference. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The court's decision was also supported by the Commission's duly promulgated regulation, 11 C.F.R. § 114.5(b)(3), and by judicial precedent. *See Pipefitters v. United States*, 407 U.S. 385, 414 (1972) (holding that the statute requires "strict segregation" of corporate or union money from that of a separate segregated fund); *AFL-CIO v. FEC*, 628 F.2d 97, 99-100 (D.C. Cir.) (section 441b is violated when a union transfers back to its separate segregated fund, prior to an election, money that was previously transferred from the fund to the union), *cert. denied*, 449 U.S. 982 (1980).

The district court's unexceptional application of these precedents to the undisputed facts of this case plainly does not warrant review by this Court. Even if it did, however, such a review would be premature here since the district court's decision has not yet been reviewed by the court of appeals.

B. Respondents' Argument Concerning the President's Removal Authority Is Both Meritless and Premature

Respondents maintain (Opp. 14) that the Act violates separation-of-powers requirements because it contains no provision governing the President's authority to remove agency members. This Court has long recognized Congress's authority to create independent agencies and " 'fix the period during which [their members] shall continue in office, and to forbid their removal except for cause in the meantime,' " *Morrison*, 487 U.S. at 687 (quoting *Humphrey's Executor*, 295 U.S. at 629). The Court has also acknowledged that any statutory limits on the presidential power to remove certain executive officials might be constitutionally suspect. *Morrison*, 487 U.S. at 690.²² But neither this Court, nor any lower court, has ever remotely suggested that the absence of any statutory provision governing the President's removal power would be unconstitutional. To the contrary, in *Bowsher v. Synar*, 478 U.S. at 725 n.4, this Court cited the absence of any provision in the Federal Election Campaign Act "specify[ing] a removal procedural" for Commissioners as being typical of "[t]he statutes establishing independent agencies,"

²² Respondents argue (Opp. 16) that the President lacks the mechanism to control the Commission that the Attorney General could use to limit the independent counsel in *Morrison*, 487 U.S. at 696. However, this Court has never found such special provisions for continuing presidential control to be constitutionally required for independent agencies whose members, unlike the independent counsel, are appointed by the President. See *Morrison*, 487 U.S. at 687 (recognizing " '[t]he authority of Congress' " to create agencies and " 'to require them to act in discharge of their duties independently of executive control' ") (quoting *Humphrey's Executor*, 295 U.S. at 629); *id.* at 690 n.28 ("the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree").

which the Court contrasted with the unconstitutional features of the removal provision in the case before it.

Respondents in effect ask this Court to *infer* from statutory silence some unstated limits on the President's power to remove Commissioners, and then to hold not only the inferred limits, but also the Commission as a whole, unconstitutional as a result. However, this Court has always required that ambiguous statutes be construed in a manner that avoids, rather than creates, such constitutional issues, see, e.g., *Morrison*, 487 U.S. at 682, and the lower courts have applied this principle by construing such silence in similar statutes to permit presidential removal for cause. *SEC v. Blinder, Robinson, & Co.*, 855 F.2d 677 (10th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *SEC v. Bilzerian*, 750 F.Supp. 14 (D.D.C. 1990).

In any event, until a President seeks to remove a Commissioner this Court has occasion to anticipate whether, or to what extent, the Act should be construed to limit the President's removal power. Accordingly, this issue is not even ripe for consideration on the facts of this case. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1392-93 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

C. Respondents' Argument Concerning the Commission's Bipartisan Composition Is Both Meritless and Premature

The provision in 2 U.S.C. § 437c(a)(1) that "no more than 3 [of the six] members of the Commission" appointed by the President "may be affiliated with the same political party" simply sets the necessary qualifications for the members of a bipartisan agency. Although the President is entitled, pursuant to Article II, § 2, cl. 2 of the Constitution, to choose the individuals to nominate as Commissioners, it has long been recognized that "it is entirely

proper for Congress to specify the qualifications for an office that it has created." *Bowsher v. Synar*, 478 U.S. at 740 (Stevens, J., concurring). See also *Myers v. United States*, 272 U.S. 52, 266-274, nn.35, 36 (1926) (Brandeis, J., dissenting). Such bipartisanship requirements have long been common for independent agencies,²³ and this Court has recognized the special value of an "inherently bipartisan" agency to "decide [the] issues charged with the dynamics of party politics" that fall within the Commission's jurisdiction. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 37. Respondents cite no authority to support their argument (Opp. 17-18) that this long-established legislative practice might be unconstitutional.

In fact, nothing in the Act suggests that the bipartisanship requirement is a judicially enforceable legal restriction on the President's power to nominate individuals to become Commissioners, rather than a directory provision enforceable only through the Senate's confirmation power. The Executive Branch has repeatedly opined that such provisions are merely "advisory," *Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990*, 25 Weekly Comp. Pres. Doc. 1851, 1852 (Nov. 20, 1989), and thus do "not constrain the President's constitutional authority to appoint officers of the United States," *Statement on Signing the Cranston-Gonzalez National Affordable Housing Act*, 26 Weekly Comp. Pres. Doc. 1930, 1931 (Nov. 28, 1990). Such a construction, which is plainly

²³ Congress has enacted bipartisan structures for, e.g., the Securities & Exchange Commission, 15 U.S.C. § 78d(a); the Federal Trade Commission, 15 U.S.C. § 41; the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(b); the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a); the Interstate Commerce Commission, 49 U.S.C. § 10301(b); and the United States Sentencing Commission, 28 U.S.C. § 991(a), which was found constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

a permissible one under the language of the Act, could be adopted if a legally binding restriction were found unconstitutional. See *supra* p. 35.

Like Respondents' other issues, however, this one is not ripe for decision on the facts of this case. As the court of appeals suggested (Pet. App. 11a), it might be that such an issue would be presented if a President appointed more than three Commissioners who were affiliated with one party and such a Commission's authority to enforce the Act were challenged. But all six of the Commissioners who participated in this case were nominated by the President and confirmed by the Senate, no one has challenged their conformity to the qualifications in 2 U.S.C. § 437c(a)(1), and the presidential statements cited above indicate that the Presidents who appointed them have not considered their nominations to be legally restricted by bipartisanship provisions. In this context, resolution of this question of statutory construction would have no effect on the outcome of this case. Thus, like the other issues presented by the Respondents in their Opposition, this issue should not be considered by the Court.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

LAWRENCE M. NOBLE
General Counsel

RICHARD B. BADER*
Associate General Counsel

VIVIEN CLAIR
Attorney

FOR THE PETITIONER
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 219-3690

*Counsel of Record

August 4, 1994